Supreme Court, U.S.
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No. 95-2039

In The

Supreme Court of the United States

October Term, 1995

LEROY LOGAN,

Petitioner,

vs.

BENNINGTON COLLEGE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari in this state law contract case as a vehicle to establish rules and procedures for the review of recusal decisions by judges of the United States Courts of Appeals, where Petitioner's recusal motion was untimely, Petitioner was afforded adequate review at the circuit court level, and where action by this Court cannot provide any meaningful relief to Petitioner?[1]

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[1] Note: Respondent does not agree that it would be appropriate for this Court to hear argument on petitioner's second question presented (challenging the Second Circuit's decision on the merits of this diversity contract case) should the Court grant certiorari on the first question. If certiorari were granted, the only appropriate relief for this Court to order would be a remand to the Second Circuit to reconsider its recusal decision under whatever rules and procedures this Court were to prescribe.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Bennington College Corporation is a non-profit corporation organized under the laws of Vermont. It has no parent or subsidiary corporation and does not issue capital stock. The caption of the case as set forth by Petitioner does not list all parties in the proceeding below. The names of all parties are listed in the Second Circuit's caption to its opinion, appearing in Petitioner's Appendix at 9a. *See also Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995).

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Procedural History	4
ARGUMENT	8
I. The Impartiality Of Judge Altimari May Not Reasonably Be Questioned	8
II. Petitioner's Motion To Recuse Was Untimely In The Second Circuit; Thus, Review In This Court Would Be Inappropriate	13
III. The Writ Of Certiorari Is An Inappropriate Vehicle To Address Petitioner's Concern Regarding An Alleged Lack Of Procedural Rules With Regard To The Disqualification of Circuit Court Judges	16
IV. Petitioner Was Afforded Due Process of Law	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1985) 13, 16

E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992) 14, 15

Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988) 9

In re Bernard, 31 F.3d 842 (9th Cir. 1994) 19

In re Continental Airlines Corp., 901 F.2d 1259, *reh'g denied*, 918 F.2d 177 (5th Cir. 1990) 12

In re International Business Machines Corporation, 618 F.2d 923 (2d Cir. 1980) 14

In re J.P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943) 10

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 13

Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147 (1994) 9, 10

Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985) 9, 11

Preston v. United States, 923 F.2d 731 (9th Cir. 1991) 15

Schurz Communications, Inc. v. F.C.C., 982 F.2d 1057 (7th Cir. 1992) 15, 19

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) 14

United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985) 19

United States v. Greenough, 782 F.2d 1556 (11th Cir. 1986) 9, 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985) 12

United States v. York, 888 F.2d 1050 (5th Cir. 1989) 14

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 19

RULES AND STATUTES

28 U.S.C. § 455 ..... 9, 12, 19

28 U.S.C. § 2071 17

Supreme Court Rule 10 ..... 8, 17, 18

OTHER AUTHORITIES

3 ABA Standards of Judicial Administration: Standards Relating to Appellate Courts (1994) 20

D. Knibb, *Federal Court of Appeals Manual* (West 2d ed. 1990) 20

Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984) 18

Hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973) 17

Stempel, *Rehnquist, Recusal, and Reform*, 53 Brooklyn L.Rev. 589 (1987) 19, 21

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Bennington College Corporation respectfully prays that this Court deny the Petition of Leroy Logan ("Petitioner") for review of the action of the United States Court of Appeals for the Second Circuit.

COUNTERSTATEMENT OF THE CASE

Respondent is a private college located in Bennington, Vermont. Petitioner Leroy Logan was an instructor of drama at Bennington College, until his termination on July 20, 1990. Petitioner's termination resulted from a sexual harassment complaint lodged against him by a Bennington College student. The complaining student testified before the College's sexual harassment committee that Petitioner Logan forced him to have sexual relations against his will on Thanksgiving Day 1989, in Cardiff, Wales, while a group of Bennington students were abroad studying in the College's "London Program". Petitioner was director of the London Program, and the teacher and counselor to the student complainant at the time of these events.

A. Statement of Facts

The Petition contains various omissions, misstatements, and errors concerning the underlying facts and history of this state law contract case. In particular, Respondent does not agree that Petitioner's analysis of the factual basis for the Second Circuit's opinion (Petition at 8-11) presents a fair review of the record. However,

these concerns are essentially irrelevant in light of the narrow reason urged by Petitioner for granting the Writ. Even if certiorari were granted to address the recusal procedure issue, this Court would not be in an appropriate procedural posture to review the merits of the Second Circuit's Opinion at this time. Contrary to Petitioner's suggestion, however, this case is not "extraordinary." It is a state law breach of contract case arising out of a faculty member's dismissal for sexual misconduct with a student. What follows is a brief outline of the underlying factual issues designed to put the case in perspective and to comply with Supreme Court Rule 15.2.

In May of 1990, a male drama student filed a sexual harassment complaint against the Petitioner Leroy Logan. The complaint was submitted to the director of student affairs and referred to the College's sexual harassment committee, pursuant to the College's written sexual harassment policy. Thereafter, the Petitioner was provided, among other things, with a copy of the student's written complaint, a notice of hearing, a list of witnesses, and a list of the members of the committee who would hear the case.

On May 31, 1990, a hearing was held before the sexual harassment committee. The members consisted of the director of student affairs, two faculty members, a student, and a staff member. All members of the committee were present at the hearing, which lasted some five hours. During the hearing the complaining student testified in detail regarding a forced sexual encounter that occurred with the Petitioner on Thanksgiving Day, 1989. Petitioner was present at the hearing along with a faculty

representative of his choice. Both Petitioner and the student complainant were allowed to question witnesses and speak at the hearing.

The committee deliberated after the hearing. Thereafter, pursuant to the College's policy, the committee delivered its written decision and recommendation to the president of the College, Elizabeth Coleman. The committee members unanimously found the student's testimony to be credible and found Petitioner's testimony to be vague and unbelievable. The committee's report determined that a forced sexual encounter had occurred, and thus that "sexual harassment", within the meaning of the College's policy, had taken place. The committee unanimously recommended to President Coleman that due to the serious nature of the charge – forced oral intercourse – Petitioner be terminated.

President Coleman accepted the findings and recommendation of the committee and informed Petitioner that he was to be terminated. Under the policy, Petitioner chose to appeal to President Coleman for reconsideration. Petitioner obtained counsel, was granted an extension of time and appeared with his attorney, Louis H. Benjamin, of the New York firm of Slotnick and Baker, to present additional evidence and arguments at a hearing before President Coleman. This hearing lasted approximately two hours.

After the hearing, President Coleman reviewed the written submissions of Petitioner and his counsel, and determined that there was no basis to reconsider the original decision to terminate Petitioner's employment.

Mr. Logan was advised of this decision, in writing, on July 20, 1990.

B. Procedural History

On April 25, 1991, Petitioner Logan filed the instant suit, alleging nine original counts against Respondent and seven individual defendants, and seeking reinstatement and money damages. After an initial hearing, the district court denied Plaintiff's Motion for a Preliminary Injunction reinstating him to his former position. Subsequently, Plaintiff stipulated to dismissal of his defamation claims, and in a series of orders the district court dismissed all of the individual defendants and four of the legal theories, including all federal questions. The sole defendant remaining in the case at the time of trial was Respondent Bennington College Corporation, and the sole counts remaining to be tried alleged various state law theories of breach of employment contract. The basis for federal court jurisdiction was diversity. At jury draw, Plaintiff withdrew his claim for permanent injunctive relief.

The jury returned a verdict of $500,000. The district court concluded that the jury had made an "error", but nonetheless denied Respondent's post trial motions for judgment as a matter of law or for a new trial. The district court did grant Respondent's Motion for Remittitur, adjusting the damage award to $202,794.02. Petitioner accepted the remitted damages award in lieu of a new trial.

Both the College and Petitioner Logan appealed to the Second Circuit. Respondent's primary argument on

appeal was that Petitioner Logan had not presented evidence sufficient as a matter of law to support his claim that the College had breached an employment contract with Petitioner. The Second Circuit agreed with Respondent and vacated the jury award. The Second Circuit's opinion clearly explains why none of Petitioner's four contract theories had been established at trial. Petitioner's Appendix at 19a-30a.[2]

In his cross-appeal, Petitioner Logan asked the Second Circuit to review the district court's dismissal on summary judgment of Petitioner's state and federal due process claims and his negligence claim. In addition, the Petitioner requested that the Second Circuit review the district court's failure to charge the jury on punitive damages. The Second Circuit rejected each of these arguments.

Oral argument took place on May 18, 1995, in New York City. Petitioner was represented in the Second Circuit, as he had been at trial, by William K. Sessions, an attorney who at that time had been nominated to fill an opening in the District of Vermont as a United States District Court judge. Subsequent to oral argument, but before the Second Circuit issued its opinion, Attorney Sessions was sworn in as United States District Judge for the District of Vermont.

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[2] Because the Second Circuit concluded that Petitioner had failed to meet his burden of proof as a matter of law, the court did not address Respondent's additional arguments for reversal. *See* Petitioner's Appendix at 30a. For this reason, among others, it would be inappropriate for this Court to entertain Petitioner's second question presented.

In light of Mr. Sessions' pending judicial appointment, there was some friendly banter during oral argument in connection with Mr. Sessions' significant trial skills. At one point during the argument, Judge Altimari indicated that he had been contacted by someone in the Justice Department concerning Mr. Sessions' judicial appointment. Judge Altimari indicated that the person should call back as he would now have something favorable to say about Mr. Sessions – that he had done a magnificent job in this case. Far from showing evidence of personal bias or prejudice *against* Petitioner on the part of Judge Altimari, the statements quoted in Mr. Logan's Petition for Certiorari must be viewed in the context of the entire oral argument.[3] Further, these statements – concerning the issue of "faculty control" at the College – must be viewed in the context of Petitioner's persistent strategy in the case to explicitly link his firing to subsequent disputes between the College's faculty and its administration.

The Second Circuit issued its opinion and order on December 14, 1996. Only after issuance of the opinion did Petitioner, through successor counsel, move to recuse Judge Altimari. The motion was prospective only, seeking to disqualify Judge Altimari from "further proceedings" in the matter. Simultaneously, Petitioner filed a Motion

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[3] The Petition for Certiorari (at p. 7) contains quotations from the oral argument drawn, Respondent believes, from an unofficial transcript prepared by Petitioner's counsel. Respondent notes for the record that this transcript does not appear to be a fully accurate verbatim transcript of the audiotape, and that Petitioner's successor counsel was not present at oral argument.

for Rehearing in the Second Circuit, with a suggestion for rehearing en banc. A central theme in the Motion for Rehearing – indeed Petitioner's first point of argument – was the issue of Judge Altimari's alleged bias. The motion to recuse Judge Altimari was also filed as an appendix to the Motion for Rehearing and Suggestion for Rehearing en banc.

The Second Circuit denied Petitioner's motion for recusal of Judge Altimari on February 23, 1996. By order dated March 11, 1996, the Court also amended its original opinion by removing reference to certain background information concerning the subsequent disputes between the faculty and the administration at Bennington College. This Order was signed by all three judges of the panel, stating that "[t]he [deleted] language contained background, and has no bearing whatsoever on the disposition of the appeal or the key issues raised on appeal concerning the sufficiency of the evidence supporting Leroy Logan's claims." The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 19, 1996. The Order denying rehearing states specifically that the motion (which included the issue of Judge Altimari's alleged bias) had been considered "by the panel" that decided the appeal, and further noted that the suggestion for rehearing en banc had been "transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon."

ARGUMENT

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion. The writ will be granted only "for compelling reasons". The Petitioner has failed to set out any "compelling" reasons why this Court ought to grant the writ, other than Petitioner's dissatisfaction with the result below. Petitioner's argument concerning the recusal of Judge Altimari provides insufficient ground for review, where the Second Circuit's decisions have all been unanimous, and no judge of the circuit considered the case worthy of en banc hearing. Petitioner has not claimed the existence of a conflict among federal circuits or state courts of last resort, nor is an important question of federal law involved. Petitioner's reliance on this Court's general supervisory authority ought to be viewed with skepticism. It is an apparent tactical device to obscure Petitioner's attempt to have this Court review the merits of the Second Circuit's decision, which Petitioner concedes would not merit review. *See* Sup.Ct.R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

I. The Impartiality Of Judge Altimari May Not Reasonably Be Questioned.

Unless grounds for disqualification are clearly established, a judge has a duty to sit on an assigned case, and should not recuse himself or herself unless an "objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would

entertain a significant doubt that justice would be done." *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985).

This is a high standard to meet. Grounds for recusal must not be lightly inferred nor motions to disqualify frequent, in light of the deleterious consequences this would have upon the judicial system. The facts required to justify recusal must not be "lightly imputed to a judge", nor based on speculation. *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 803 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988); *see United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) ("a charge of partiality must be supported by facts").

Under 28 U.S.C. § 455(a), recusal is "required only if the judge's impartiality 'might *reasonably* be questioned.' " *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 1158 (1994). In his concurring opinion in *Liteky*, Justice Kennedy described the operation of § 455(a) as follows:

> [I]t should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

114 S. Ct. at 1158. Petitioner presented no evidence to the Second Circuit of personal interest, bias, or prejudice on

the part of Judge Altimari, nor any basis for reasonably questioning his impartiality.

Petitioner argues that Judge Altimari's remarks at oral argument concerning "faculty control" at the College, and a paragraph of background information in the Second Circuit's original opinion about the College's highly publicized downsizing, were surprising, or out of place, and therefore evidence of bias on the part of Judge Altimari. But "[d]isinterestedness does not mean child-like innocence," *Liteky*, 114 S. Ct. at 1155 (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943)), and "[t]he acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office." *Liteky*, 114 S. Ct. at 1161 (Kennedy, J., concurring). Petitioner's contention was appropriately rejected by the Second Circuit and flies in the face of reality for a number of reasons.

First, Petitioner's previous counsel's trial strategy was to put directly in issue both "faculty control" and the restructuring of the College. At trial, Petitioner's counsel was aggressive in his pursuit of the theme that the College administration was engaged in a general abuse of power over faculty and that Petitioner's termination was related to the subsequent termination of a significant number of faculty members in the College's restructuring. Petitioner introduced evidence that the faculty members who had "supported" him had lost their jobs in the restructuring, and Petitioner's counsel argued at trial and on appeal that the terminations resulting from the College's restructuring and Petitioner's firing were motivated by the "same administrative arrogance". *See* Brief for Appellee/Cross-Appellant Logan at 45; Tr. IV, pp. 49-50.

In addition, Petitioner's counsel vigorously pursued at trial the position that Bennington College was, at the time of Petitioner's termination, a "faculty run organization." *See, e.g.*, Tr. I, p. 24. Petitioner's counsel pressed the same point at oral argument in the Second Circuit: "Bennington College has been traditionally a place in which faculty has had tremendous impact upon . . . . " This statement prompted Judge Altimari to "call" counsel on his hyperbole, by saying, "and get very upset and uptight when something is done without their imprimatur. And the President doesn't mean anything, the Dean doesn't mean anything – no one means anything in that institution, other than the members of the faculty who control everything that goes on." In fact Judge Altimari was merely restating the position that had been taken by Petitioner's faculty witnesses at trial and by Petitioner's counsel at trial and on appeal.

Second, the comments of Judge Altimari quoted in the Petition must be considered in the context of the entire oral argument. The tone of the argument can best be characterized as "light," and many of the comments made by the court were favorable to Petititioner or his counsel. As a whole, the atmosphere at oral argument was directly contrary to its characterization by the Petitioner. An objective disinterested observer, fully informed of the facts, would have no significant doubt that justice could be done. *See Pepsico*, 764 F.2d at 460.

Finally, in light of Petitioner's persistent strategy, it is not surprising that the original Second Circuit opinion made reference to the College's "downsizing" and noted that many "professors . . . contend that they were fired simply because they sided with Logan in the instant

dispute." These comments simply track Petitioner's evidence at trial and his theme in this case. *See, e.g.*, Brief for Appellee/Cross-Appellant Logan at 45. Further, a judge is not a juror, and the reference in the opinion to two articles about the College in high-profile news publications does not implicate the standard set out by 28 U.S.C. § 455. As Petitioner concedes, the articles cited in the opinion represent opposing sides of the clash, and the court does not take sides. The Second Circuit later amended its opinion to remove these references, with all three judges of the panel concluding that the information was "background" only, and had "no bearing whatsoever on the disposition or the key issues raised on appeal concerning the sufficiency of the evidence supporting [Petitioner's] claims." Petitioner's speculation concerning Judge Altimari's views does not provide grounds for recusal, nor for review by this Court.

Moreover, even if recusal were appropriate, review by this Court is unwarranted, as there exists no basis to reverse the Second Circuit's disposition of the case. Decisions to vacate lower court rulings based upon recusal have been issued in only the most stringent circumstances. One court noted that "[o]ur research has not turned up any case involving mere appearance of impropriety in which the court set aside decisions that had been taken by the district judge before any party asked for recusal." *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U. S. 1012 (1986). Even where a judge should have recused himself, courts are reluctant to vacate a prior decision. *See In re Continental Airlines Corp.*, 901 F.2d 1259, 1263, *reh'g denied*, 918 F.2d 177 (5th Cir. 1990).

This Court has indicated that the decision to vacate a lower court opinion may turn on whether the vote of a judge in question was a swing vote and has recognized that courts have held that "a decision need not be vacated where a disqualified judge's vote is mere surplusage." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985). *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988) ("There need not be a draconian remedy for every violation of § 455(a)"). In the present case all of the Second Circuit's rulings have been unanimous. Judge Altimari's vote was not a swing vote; therefore, his participation cannot have deprived petitioner of any substantial right. There is thus no risk of injustice to the parties in this case, or in other cases, *see Liljeberg*, 486 U.S. at 864, nor is there any risk – given the procedures followed here, including en banc review – of undermining the public's confidence in the judicial process, *id.*

For these reasons no compelling or important reason for review of the Second Circuit's unanimous decision has been shown.

II. Petitioner's Motion To Recuse Was Untimely In The Second Circuit; Thus, Review In This Court Would Be Inappropriate.

Although Petitioner's motion in the Second Circuit for recusal was framed prospectively, it was in essence an argument that Judge Altimari should have recused himself from determination of the appeal in the first instance. The grounds for Petitioner's motion were the comments of Judge Altimari at oral argument, and in his motion to the Second Circuit, Petitioner argued that Judge

Altimari's bias was shown at the time of argument. Yet Petitioner never filed a request to disqualify Judge Altimari following that argument and before the Second Circuit's decision, issued almost seven months later. Rather, Petitioner waited until an unfavorable decision was handed down before raising the issue of disqualification. Certainly, the mere fact that the Second Circuit has ruled against Petitioner, in a decision issued unanimously by a panel of three appellate judges, cannot in itself provide grounds for disqualification.[4]

It is well established in the Second Circuit, and elsewhere, that a motion for the disqualification of a judge must be made in a timely manner. *In re International Business Machines Corporation*, 618 F.2d 923, 932 (2d Cir. 1980); *see also, e.g., E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280 (9th Cir. 1992); *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986). Timeliness requires the party making the recusal motion to do so "at a reasonable time in the litigation," and not delay for strategic purposes. *York*, 888 F.2d at 1055.

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[4] Petitioner attempts to argue in this Court that it was only upon noting the inclusion of certain background material in the written opinion of the Second Circuit that the grounds for disqualification became clear. Yet the crux of Petitioner's argument for recusal is based upon Judge Altimari's oral remarks, and, as discussed above, the background section in the opinion merely reflected Petitioner's own theory of the case. Moreover, all three judges of the Second Circuit panel concluded that the background materials had "no bearing whatsoever on the disposition of the appeal". Petitioner's Appendix at 4a.

The Ninth Circuit recently considered a timeliness issue directly analogous to the one at hand. The defendant in *Gallo*, 967 F.2d at 1280, moved for a new trial after judgment was entered against him in a bench trial, arguing that the judge should have disqualified himself in the proceeding. The court ruled the motion untimely:

> [I]t does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to the court's attention. It is well established in this Circuit that a recusal motion must be made in a timely fashion . . . . "The absence of such a requirement would result in . . . a heightened risk that litigants would use recusal motions for strategic purposes."

Gallo, 967 F.2d at 1295 (citations omitted) (quoting *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991)). The court held that a litigant should not be allowed to "withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke Section 455 in order to get a second bite at the apple." 967 F.2d at 1295. Similarly, in *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1057 (7th Cir. 1992), the court held that a motion to disqualify the judge filed two weeks after issuance of the decision was too late, noting that "[l]itigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them." *Schurz*, 967 F.2d at 1060. Because Petitioner knew of the alleged grounds for disqualification at the time of oral argument, yet waited

until after the decision was rendered against him, Petitioner's recusal motion was untimely, and review by this Court would not be appropriate.

Moreover, the recusal motion put forth by Petitioner in the Second Circuit sought relief only *prospectively*. As framed by Petitioner, the issue of recusal was relevant only on Petitioner's Motion for Rehearing, which was unanimously denied by the panel of three judges, and which no judge considered worthy of en banc consideration. Even if Judge Altimari should have been recused at that point, a unanimous decision on the merits had already been issued, and the two other judges on the panel also voted against rehearing. As such, this Court can offer no meaningful relief to Petitioner. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985) (noting that courts have found that "a decision need not be vacated where a disqualified judge's vote is mere surplusage").

III. The Writ Of Certiorari Is An Inappropriate Vehicle To Address Petitioner's Concern Regarding An Alleged Lack Of Procedural Rules With Regard To The Disqualification Of Circuit Court Judges.

Although Petitioner attempts to clothe his argument with the rubric of due process, the concerns presented are more academic than actual and do not warrant review in this case. Even if a lack of set standards or procedural rules regarding the recusal of appellate judges were a real or perceived problem, a grant of certiorari in any particular case – and in particular this case – would not be an appropriate mechanism to address the issue.

If, as Petitioner states, there is a complete lack of rules and procedures in connection with the disqualification of circuit judges, the matter should then be referred to an appropriate committee through the Judicial Conference, or other body. After appropriate study, if a need were found, this Court could promulgate rules of general applicability pursuant to the Rules Enabling Act or other authority. *See* 28 U.S.C. § 2071 *et seq.* Neither party in this matter has the interest, expertise, or breadth of experience necessary to assist the Court in determining the types of procedures and guidelines that are or should be followed in all of the federal courts of appeals.

Further, this Court should not use its supervisory authority over the lower federal courts to engage in such a task in this case. This Court's general supervisory authority is limited to "extraordinary" cases where a lower court has "so far departed from the accepted and usual course of judicial proceedings in a matter affecting not only the correctness of its decision but the public interest in the process by which justice is administered . . . as to call for an extraordinary exercise of [the Supreme C]ourt's power of supervision." P. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1628 (2d ed. 1973); *see also* Sup. Ct. R. 10(a). Here, the Second Circuit's handling of this state law matter was well within the norms of ordinary appellate judicial consideration. The court's unanimous decision is both thorough and well-reasoned, with ample grounding in the record and in established law. No active judge on the Second Circuit felt the case worthy of en banc consideration. While Petitioner does not like the result, there is nothing "extraordinary" about an appellate court finding

that a party has not met its burden of proof as a matter of law.

There is also no record in this case concerning the usual practices and procedures followed for disqualification of appellate judges as a matter of course in the Second Circuit, or in other circuits. The Petitioner merely states "it is entirely unclear what procedure is to be followed when such a motion is made." Petition at 15. Despite Petitioner's asserted lack of clarity, in this case Petitioner raised and briefed the recusal issue as the central point in his motion for rehearing, which was denied unanimously by the three judge panel and submitted to all active judges for en banc consideration. Thus, the actual procedure followed in this particular case was more than sufficient to protect "the appearance and the reality of a dispassionate judiciary". *See* Petition at 18. There has been no departure from "the accepted and usual course of judicial proceedings," *see* Sup. Ct. R. 10(a), warranting an exercise of this Court's supervisory power.[5]

Finally, a grant of certiorari in this case cannot provide any meaningful relief for Petitioner. If the issue is a lack of procedure – and Petitioner concedes this is the only viable reason to grant the Writ – then relief in this

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[5] Discussing the Court's "extraordinary" power of supervision, commentators note that the power should be exercised only to correct "egregious error", and a writ of certiorari should not be granted solely to ensure correct results as to individual litigants. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 733 (1984).

Court would be limited to the Court's setting forth a procedure and remanding the matter to the Second Circuit to carry out the procedure. Following such a procedure, either Judge Altimari would be recused, or not. Even if he were recused, it is already known that the two other judges on the panel have voted against rehearing the case, and that no other judge on the Second Circuit has asked for a rehearing en banc. Accordingly, there will be no relief for Petitioner.

IV. Petitioner Was Afforded Due Process of Law.

To assure that a litigant's right to "a neutral and detached judge," *see Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), is not abridged, codes of judicial conduct are in place, and statutory provisions require that judges act without bias or prejudice. Such provisions are generally considered self-executing. *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985). Nevertheless, litigants are afforded the procedural mechanism of moving to disqualify a judge in a case where grounds for disqualification are alleged.

The few courts that have addressed recusal procedure at the appellate level recognize that a motion to disqualify an appellate judge under § 455 is properly first considered by the judge at whom the motion is directed. *See In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *Schurz*, 982 F.2d at 1059; *Balistrieri*, 799 F.2d at 1202-03. A motion for rehearing, en banc consideration, application for an extraordinary writ, and certiorari in this Court provide various avenues of review. *See* Stempel, *Rehnquist, Recusal, and Reform*, 53 Brooklyn L.Rev. 589, 639 (1987); D.

Knibb, *Federal Court of Appeals Manual* § 5.2, at 28-29 (West 2d ed. 1990). These procedures are adequate and appropriate in light of the special considerations that operate in a multi-member appellate court. *See 3 ABA Standards of Judicial Administration: Standards Relating to Appellate Courts*, § 3.42, at 80-81 (1994).

The ABA Standards recognize that there are a number of factors calling for different recusal procedures at the appellate court level, as compared to district court,[6] and less need for a more formalized system of review. An appellate judge is "subject to collegial restraint" and informal review by his peers; an appellate judge's personal views and views on the law can be difficult to differentiate, and to a certain extent should not be differentiated, as an appellate court's role is to contribute to the development of law; an appellate judge is faced primarily with questions of law rather than fact and has limited discretion in reviewing the issues on appeal; and lastly, there is significantly less interaction between the various players once the case has reached the appellate courtroom, which reduces the risk of bias and partiality to any particular party, thereby reducing any risk of injustice. As such, the American Bar Association standards conclude that "it is better that the question of recusal be decided by the challenged judge". *Id.* § 3.42, at 81; *see also* D. Knibb, *supra* § 5.2 at 30 (noting high

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[6] The denial of a recusal motion in the district court may be reviewed by way of direct appeal to the Circuit Court of Appeals, but such review is for abuse of discretion only. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986).

qualifications and experience of the judges of the United States Courts of Appeals).

In this case, the initial decision on the recusal motion was issued by "the court," thus ensuring that it was not only the judge whose impartiality was being questioned that issued the ruling. *See* Petitioner's Appendix 8a. Petitioner complains that he does not know who actually decided the recusal motion, and suggests that it was in fact decided only by Judge Altimari. Petition at 17. Such speculation should not provide grounds for review, since a decision issued by "the court" must be presumed tc have been issued by the entire panel. Even if Judge Altimari made the initial determination alone, however, his role within the multi-member court would subject him to "collegial restraint" and informal review by his peers, and issuance of the decision by "the court" gives it the court's imprimatur and approval.

In addition, Petitioner made the recusal issue a centerpiece of his motion for rehearing and suggestion for rehearing en banc. The recusal issue was briefed in the motion for rehearing, and a copy of the recusal motion itself was submitted as an appendix to the motion for rehearing and suggestion for rehearing en banc. The motion for rehearing was considered and denied, unanimously, by the three judge panel, and no Second Circuit judge felt the case worthy of en banc review. *See* Stempel, *supra*, 53 Brooklyn L.Rev. at 639 (noting role of en banc review of circuit court judge's denial of recusal motion). Accordingly, it cannot be said that there has been no effective review of the recusal decision, and Petitioner received such process as was due.

CONCLUSION

The Petition for Certiorari should be denied in all respects.

Respectfully submitted,

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